No. 01-20-00004-CR & No. 01-20-00005-CR

In the Court of Appeals for the
First District of Texas at Houston

Ex parte

JOSEPH ERIC GOMEZ,
Applicant

On Appeal from Trial Court Case No. 1657519 and 1657521
Before the 338th Judicial District Court of Harris County, Texas

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APPLICANT'S REPLY BRIEF AND REQUEST FOR EXPEDITED SUBMISSION

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ORAL ARGUMENT REQUESTED

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TO THE HONORABLE COURT OF APPEALS:

Applicant offers the following reply to the State's Reply Brief filed on March 4, 2020 and, pursuant to Rules 2 and 31, Texas Rules of Appellate Procedure, moves this Court to set this matter for submission at the earliest practical time.

REPLY TO STATE'S REPLY TO POINT ONE

In their reply to Point of Error One, the State repeatedly emphasizes that this Court should consider the "plain language of Article 17.09."[1] Indeed, a closer look at the plain language of the statute is warranted.

The fault in the State's position is that it looks at consideration of a bond being "insufficient" in isolation. By its argument, the State reads Article 17.09 to be applied in this manner:

> A judge or magistrate may, either in term-time or vacation, order the accused to be rearrested and require the accused to give another bond in such amount as the judge or magistrate may deem proper whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds:
>
> (a) that the bond is defective, excessive or insufficient in amount, **or**

[1] State's Reply Brief at 10–15.

(b) the sureties, if any, are not acceptable, **or**
(c) any good and sufficient cause.

Using this interpretation, the State then goes through, case by case, and distinguishes the cases cited to by Applicant in his Brief on the basis that those cases involved situations where the courts held that there was not good and sufficient cause — option (c) on the preceding list.[2] And, because this was not one of those situations, but instead a situation where the trial court simply found the bond was "insufficient" — option (a) on the preceding list — then no weight should be given to that precedent and this Court should simply review the trial court's decision to find that the bond was, indeed, "insufficient."

This reading of the statute, however, fails to give due consideration the word "**other**." By stating that the court may revoke and raise the bond for "any **other** good or sufficient cause," the legislature clearly intended to use "other" as a modifier and have it applied as an element to each circumstance. In this case, the statute reads, and is to be applied as follows:

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[2] State's Reply Brief at 12–13.

> A judge or magistrate may, either in term-time or vacation, order the accused to be rearrested and require the accused to give another bond in such amount as the judge or magistrate may deem proper whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds **the following good and sufficient causes**:
>
> (a) that the bond is defective, excessive or insufficient in amount, **or**
> (b) the sureties, if any, are not acceptable, **or**
> (c) any **other** good and sufficient cause.

Without consideration of this modifier, to use the State's interpretation absolutely "leaves courts unaccountable."[3] A trial court could, under the State's interpretation, revoke and raise a bond whenever it deems that bond to be "insufficient" without limitation. By their logic, the trial court could say, "I find that the bond is insufficient because the defendant's hair is too long," or "I find that the bond is insufficient because the defendant lives in a bad part of town," or "I find that the bond is insufficient because the defendant went to a certain school," and therefore, be authorized to have the defendant rearrested and required to give a new, higher bond. The list is endless.

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[3] State's Reply Brief at 13.

The State's solution — for an aggrieved defendant to file a motion to reduce bail or an application for writ of habeas corpus[4] — is no solution at all. Such a process still involves illegally detaining a person presumed to be innocent. Should a person whose bond is deemed "insufficient" because their hair is too long have to sit in custody for months while a habeas application is pending and considered by the trial court (and possibly the appellate courts)? This is certainly not consistent with precedent and our Constitution.[5]

REPLY TO STATE'S REPLY TO POINT TWO

A. No Notice of the Trial Court's Hearing to Revoke and Raise His Bond

The State first responds to Applicant's second point of error by stating, "The appellant was not entitled to notice because this was not a 'hearing'" and that he "cites no authority for the proposition that he's entitled to notice before being arrested."[6]

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[4] *Id.*

[5] *See O'Donnell v. Harris County*, 892 F.3d 147, 158 (5th Cir. 2018)("Texas courts have repeatedly emphasized the importance of bail as a means of protecting an accused detainee's constitutional right 'in remaining free before trial,' which allows for the 'unhampered preparation of a defense, and ... prevent[s] the infliction of punishment prior to conviction.'").

[6] State's Reply Brief at 16.

In regard to its first point that this was not a "hearing," Black's Law Dictionary defines a "hearing" as a "judicial session, usually open to the public, held for the purposes of deciding issues of fact or of law, sometimes with witnesses testifying."[7] What happened in this case? Applicant appeared in court for a "judicial session" where he was called up to the bench.[8] The trial court, despite Applicant's previous requests not to have counsel appointed to represent him, had some unknown attorney stand in next to him.[9] The trial court heard a summary of the evidence against Applicant given in the form of inadmissible hearsay read by a prosecutor for the State.[10] The trial court then decided, as a matter of law and based on the evidence presented, that Applicant's bond that

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[7] BLACK'S LAW DICTIONARY (11th ed. 2019).

[8] Applicant's Exhibit 8 (Unsworn declaration of Applicant), Reporter's Record (hereafter "RR") Vol. 4 at 27–28 (admitted at RR Vol. 2 at 15).

[9] *See* Applicant's Exhibit 2 (Statutory Warning by Magistrate – Probable Cause for Further Detention – PR Bond/Bail Orders for both cases), RR Vol. 4 at 6–11 and Applicant's Exhibit 5 (Video of probable cause hearing) (both admitted RR Vol. 2 at 9)(reflecting Applicant's desire to not have counsel appointed to represent him in the trial court); RR Vol. 1 at 4–5; RR Vol. 2 at 24 (reflecting the trial court's *sua sponte* appointment of unknown counsel).

[10] *See* RR Vol. 1 at 11; RR Vol. 2 at 24.

he had just posted should be revoked and raised.[11] By all accounts, that sounds like a hearing.

The State then says there was "no revocation here."[12] Really? In the Supplemental Clerk's Record for Trial Court Case No. 1657519 at Page 8 is the Court Directive that states, "BY THE ORDER OF THE COURT… Bond REVOKED."[13] That is the trial court's language, not Applicant's.

The State concludes their response on this point by stating that "appellant has produced no authority showing he had a right to notice before being arrested and ordered to get a new bond."[14] Apparently the State disregards the portions of Applicant's brief where he quotes language from the United States Supreme Court acknowledging that the

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[11] *See* RR Vol. 2 at 24; Supp. CR for Cause No. 1657519 at 8.

[12] State's Reply Brief at 19 ("But, the appellant's inaccurate language notwithstanding, there was no revocation here.").

[13] (emphasis in original); *see also* Supp. CR for Cause No. 1657521 at 13.

[14] State's Reply Brief at 21.

"[f]ailure to give notice violates 'the most rudimentary demands of due process of law.'"[15]

B. Denial of His Constitutional Right to Counsel of His Own Choosing

The State replies to this point by stating that the trial court did not violate Applicant's right to have counsel of his own choosing because he had not yet retained counsel prior to appearing before the trial court. This argument is entirely disingenuous.

As the evidence indisputably established, Applicant was released from the Harris County Jail not more than six hours before having to appear before the trial court.[16] It is well-known that the purpose of these initial court appearances used throughout the Harris County Criminal District Courts is for the court to establish whether an individual defendant has retained counsel, is requesting appointed counsel, or needs an opportunity to retain counsel.[17] Applicant had previously

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[15] *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S. Ct. 1187, 1190, 14 L. Ed. 2d 62 (1965)).

[16] *See* Applicant's Exhibit 7 (Bail bonds for both cases), RR Vol. 4 at 21–26 (admitted at RR Vol. 2 at 14).

[17] *See* Rule 6.12, Local Rules of the Judicial District Courts Of Harris County ("This hearing will be to determine the attorney of record.").

indicated to the magistrate at the jail that he was not requesting the appointment of counsel to represent him in the district court.[18] And, as Applicant attested in his unsworn declaration, it was his intention to "show up and ask for a reset to hire [undersigned counsel]."[19]

The real problem is that the trial court never gave him that opportunity. Before Applicant could say anything, he was called up to the bench, forced to listen to the prosecutor read the probable cause statement, and the trial court then immediately revoked and raised his bonds.[20] To expect a young man with limited experience in the criminal justice system to interrupt, speak up, and make an objection on his own under these circumstances in order to have his complaint considered by this Court is a mockery of justice and fundamentally unfair.[21]

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[18] *See* Applicant's Exhibit 2 (Statutory Warning by Magistrate – Probable Cause for Further Detention – PR Bond/Bail Orders for both cases), RR Vol. 4 at 6–11 and Applicant's Exhibit 5 (Video of probable cause hearing) (both admitted RR Vol. 2 at 9)

[19] Applicant's Exhibit 8 (Unsworn declaration of Applicant), Reporter's Record (hereafter "RR") Vol. 4 at 27–28 (admitted at RR Vol. 2 at 15).

[20] *Id.*

[21] Nor should he be faulted for the failure of this unknown attorney — *sua sponte* appointed by the trial court and who never even spoke to Applicant prior to approaching the bench — to either request a record of the proceeding or make the necessary objection.

C. The Rules of Evidence Were Not Applied

The State concludes its reply by stating that the Rules of Evidence did not need to apply, repeating its same, previous, absurd argument that what took place was not a "hearing."[22] It continues by stating that in a proceeding like this, "There is no requirement of evidence, that the parties present arguments, that the parties be present, or that court even be in session."[23]

The problem is that is exactly what took place here. The parties were present. The court was in session. The trial court heard evidence from in inadmissible form. And for what reason? To consider whether to revoke the bonds just posted by Applicant and raise the bail amount.

If anything, the fact that the Rules of Evidence contemplate that, while the Rules normally do not apply in bail proceedings, an exception is made and they do apply in "hearings to deny, revoke or increase bail," demonstrates that there is something different about a proceeding where someone who is free on bond is facing having their bond taken away from them. In other words, the framers of the Rules recognized

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[22] State's Reply Brief at 23.

[23] *Id.*

that more protection was needed in a situation such as this where an individual, presumed to be innocent, was facing a deprivation of their liberty.

While the State has made it painfully obvious that they do not care about those protections, it is up to this Court to ensure that they remain in place. Because the trial court abused its discretion by revoking and raising Applicant's bail without good and sufficient cause and, because the manner in which it did so violated due process, Applicant respectfully requests that this Court reverse the judgment of the trial court, grant Applicant habeas relief, and order that the original bonds posted be reinstated.

REQUEST FOR EXPEDITED SUBMISSION

It is no coincidence that undersigned counsel filed this Reply Brief on behalf of Applicant less than 24 hours after the State filed its reply brief at 10:30 p.m. on March 4, 2020. Joseph Gomez has now been illegally detained and left sitting in the Harris County Jail for **111 days**. As the Rules of Appellate Procedure provide, the purpose of this appeal is "to do substantial justice to the parties" and to do so "at the earliest practicable time." TEX. R. APP. P. 31.1 & 31.2.

Applicant respectfully requests that, due to his continuous illegal detention, this Court set this matter for submission at the earliest practicable time.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been served on to the attorney for the State, Clint Morgan, Harris County District Attorney's Office, pursuant to Texas Rule of Appellate Procedure 9.5 (b)(1), through Appellant's counsel's electronic filing manager on March 5, 2020.

/s/ T. Brent Mayr
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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(B) and 9.4(i)(3), undersigned counsel hereby certifies that this computer-generated document contains 2,111 words as calculated by the word count feature contained within the program used to prepare said document, namely, Microsoft Word for Office 365.

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